A

JF APEX SECURITIES BHD

v.

CHEW KOK LIAN

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D3-22-145-2007]
20 APRIL 2009

C ***CIVIL PROCEDURE:*** *Summary judgment - Application for - Rules of the High Court 1980, O. 14 - Bona fide issues - Whether arose - Whether matters raised merited trial - Whether an appropriate case for summary judgment*

D The plaintiff was seeking to enter final judgment summarily against the defendant pursuant to an O. 14 Rules of the High Court 1980 (RHC 1980) application (encl. 7). By an agreement, the defendant had applied to open an Individual Trading Account with the plaintiff for the purpose of trading in shares listed at the Bursa Saham Kuala Lumpur (trading agreement). As agreed under the E terms of the trading agreement the defendant executed a letter of pledge. The defendant allegedly failed to settle outstanding sums due under the said trading agreement. The plaintiff initiated this action claiming for the sum of RM539,781.68 which included F interests. The defendant raised several issues, all with the object of showing triable issues and non-appropriateness of this O. 14 application. The issues that arose could be housed under two broad categories: non-compliance of statute and non-compliance of the terms of the agreement.

G **Held (dismissing encl. 7 with costs):**

(1) Order 14 proceedings are meant for uncontestable or virtually uncontestable cases. This was not a case appropriate for summary judgment. There was no necessity to deal with each H and every issue raised to see if the test was met. Suffice if just one issue was shown to befit a trial. Here, the defendant had shown that the defence pleaded was real and *bona fide* and ought to proceed to trial. (para 7)

I **(2)** The defendant had specifically alleged that the plaintiff was not licensed to trade in shares. This plea had not been countered in any way, be it by a reply or an affidavit offering the appropriate evidence or explanation. This issue was

without doubt relevant to the whole claim. Also, it was the defendant's submission that not only was the statement of accounts not received, there was no evidence or explanation on what was the 'customary practice' for imposition of rates of interests. This was a fair and *bona fide* issue for trial. (paras 8 & 10)

(3) By cl. 3 of the letter of pledge the parties had agreed that the plaintiff be given absolute discretion in the dealing of the securities pledged. The plaintiff was not obliged to realize the securities pledged before proceeding with this claim. However, this was relevant to the issue of a failure to mitigate as pleaded in the defence. Again, this matter merited trial. (para 12)

Case(s) referred to:
Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 30
Evidence Act 1950, s. 90A
Rules of the High Court 1980, O. 14, O. 41
Securities Industry Act 1983, ss. 38, 121
Stamp Act 1949, s. 52

For the plaintiff - R Ratha; M/s SG Lingam & Co
For the defendant - Rajan Navaratnam; M/s Rajan Navaratnam

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JC:

[1] The plaintiff is seeking to enter final judgment summarily against the defendant pursuant to an O. 14 Rules of the High Court 1980 (RHC 1980) application (encl. 7). The application is supported by an affidavit affirmed on 14 May 2007 (encl. 6).

[2] By an agreement dated 10 March 2005, the defendant had applied to open an Individual Trading Account (No. JH5-3F20861) with the plaintiff for the purpose of trading in shares listed at the Bursa Saham Kuala Lumpur (Trading Agreement). As agreed under the terms of the Trading Agreement the defendant

executed a Letter of Pledge on the same date. The defendant allegedly failed to settle outstanding sums due under the Trading Agreement. Despite a letter of demand issued by solicitors for the plaintiff on 15 December 2006 the defendant did not settle the sum. The plaintiff then initiated this action claiming for RM539,781.68 which sum includes interest as at 18 January 2007, interest at 11% per annum on the total amount from 19 January 2007 till full settlement, and costs.

[3] A defence has been filed wherein *inter alia* the following issues are pleaded:

a. Plaintiff is not licensed to trade in shares;

b. Plaintiff has breached the terms of the Trading Agreement and the Letter of Pledge;

c. Plaintiff has violated Business Rules for Bursa Saham, Power of Attorney Act 1949, Securities Industries Act 1983;

d. Plaintiff has been negligent in handling of the shares;

e. Plaintiff has breached duty as trustee;

f. Plaintiff purchased shares without the defendant's knowledge or consent;

g. Interest imposed by the plaintiff violates Civil Law Act 1956 and/or is not in accordance with the terms of the Trading Agreement;

h. Notices not received;

i. Particulars to sum claimed not provided to the prejudice of the defendant;

j. Statement of account or contract notes of shares traded not given to the defendant.

[4] At least seven affidavits in reply were filed by the respective parties towards this application. Apart from expanding on the issues already pleaded the defendant has raised several other issues, all with the object of showing triable issues and non-appropriateness of this O. 14 application. These numerous issues can be housed under two broad categories: non-compliance of statute and non-compliance of the terms of the agreement.

[5] Non-compliance of statute is raised in relation to the documents and evidence relied upon in support of the application. The laws being s. 52 Stamp Act 1949; ss. 38 and 121 Securities Industry Act 1983; s. 90A Evidence Act 1950; O. 41 RHC 1980; and ss. 24 and 30 Contracts Act 1950.

[6] Insofar as non-compliance of the terms of the agreement are concerned, learned counsel for the defendant submitted that transactions were unauthorized; there are errors, discrepancies in the statement of accounts; and demand and margin call notices, contract notes and statement of accounts were either not issued or issued with insufficient particulars.

[7] In *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 the Supreme Court held that O. 14 proceedings are meant for uncontestable or virtually uncontestable cases. All that a defendant needs to do is "show that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence ... The defence need only to show that there is a triable issue or question or ought for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given". Applying those well-laid principles and upon careful consideration of the cause papers, in particular the pleadings and the various affidavits filed as well as submissions of both learned counsel, I find that this is not a case appropriate for summary judgment. There is no necessity to deal with each and every issue raised to see if the test is met. Suffice if just one issue is shown to befit trial. Here the defendant has shown that the defence pleaded is real and *bona fide* and ought to proceed to trial.

[8] Firstly, at para 4 of the defence filed the defendant has specifically alleged that the plaintiff is not licensed to trade in shares. This plea has not been countered in any way, be it by a reply or an affidavit offering the appropriate evidence or explanation. This issue is without doubt relevant to the whole claim.

[9] Next, there are several clauses in the Terms and Conditions of the Account Opening (encl. 6 exh. "JFAS1") that must be given effect to, namely cls. 3 and 6(ii). These clauses read as follow:

3. Interest Rate

The client agrees to pay all charges imposed by the Company including the imposition of interest at such rate as is customary practice on all monies due and payable to the Company including but not limited to handling and service charges.

6. Rights Of The Client

(ii) Conclusiveness of Statements

The client shall examine all reports of executions of orders, demands, notices, contract notes, all statements of accounts and confirmation dispatched by the Company to the Client which shall be deemed conclusive as against the Client if not objected to in writing ... or any statement of accounts or contract note or any judgment or award obtained by the Company against the Client shall be conclusive and binding on the Client with regard the indebtedness of the Client to the Company for all purposes whatsoever including for the purpose of legal proceedings.

[10] It is the plaintiff's submission that because the statement of accounts containing the element of interest has not been objected to by the defendant in the manner and within the time prescribed under cl. 6(ii), it is both too late and an afterthought for the defendant to now challenge the same. The Certificate of Indebtedness prepared pursuant to this same clause and as seen in encl 6 exh. "JFAS5" is also conclusive and binding evidence of the indebtedness of the defendant. In response, it is the defendant's submission that not only was the statement of accounts not received, there is no evidence or explanation on what is the "customary practice" for imposition of rates of interests. In the face of denials and there being no evidence to the contrary this issue I agree that there is a need to establish what is customary practice in relation to interest. This is a fair and *bona fide* issue for trial.

[11] On the matter of the failure to realize shares pledged. The argument here is that the existence of these shares ought to have been pleaded and an explanation offered as to their status. Such failure is submitted by the defendant to affect the total indebtedness of the defendant. In response learned counsel for the

plaintiff relied on cl. 3 of the Letter of Pledge (encl. 6 exh. "JFAS2") where the parties had agreed to leave the option to the plaintiff:

> **Authority to Sell Securities**
>
> If the indebtedness hereby secured shall not be duly paid to you on the due date or on demand by you (as the case may be) you may forthwith without notice to me and without my consent sell assign transfer or otherwise dispose of the Securities or any of them at such price and upon such conditions and to such persons without being responsible for any loss/diminution in value as you in your absolute discretion may think fit and may apply the net proceeds of such sale in or towards the costs incurred therein and of the indebtedness in such manner as you deem fit and the residue (if any) shall be paid to the other of the person(s) legally entitled thereto. In the event that the net proceeds of such sale actually received by you shall be insufficient to cover the whole of the indebtedness I undertake to pay to you immediately on demand any balance which then be due.

[12] In this respect I agree that by cl. 3 of the Letter of Pledge the parties have agreed that the plaintiff be given absolute discretion in the dealing of the securities pledged. The plaintiff is not obliged to realize the securities pledged before proceeding with this claim. However this is relevant to the issue of a failure to mitigate as pleaded in the defence. Again this matter merits trial.

[13] For the reasons set out, encl. 7 is dismissed with costs.